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February 6, 1997

Mr William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C 20554

DOCKET FILE COPY ORIGINAL

Dear Mr Caton

**Re: Attached Memorandum in the Matter of International Settlement  
Rates-IB Docket No. 96-261 and Notice of Proposed Rule Making (NPRM)  
published by the Federal Communications Commission**

The management of Telecommunications of Jamaica Limited (TOJ), hereby submits the above-captioned memorandum which states our objections to the FCC's proposals to adopt mandatory settlement rate benchmarks and related policies.

The memorandum outlines our specific objections to the FCC's attempt to unilaterally impose international accounting rates. Additionally, our submission emphasizes the extreme level of economic harm posed to our national telecommunication infrastructure by the proposals outlined in the FCC's NPRM.

As articulated in our memorandum, TOJ registers our strong opposition to the FCC's NPRM and we accordingly call upon the FCC to withdraw the document.

Yours truly

TELECOMMUNICATIONS OF JAMAICA LTD

Errald Miller  
President & CEO

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## MEMORANDUM

IN THE MATTER OF International  
Settlement Rates-IB Docket No. 96-261 and  
Notice of Proposed Rule Making published  
by the Federal Communications  
Commission

PRESENTED BY: TELECOMMUNICATIONS OF JAMAICA LIMITED

TO: THE FEDERAL COMMUNICATIONS COMMISSION

1. The Federal Communications Commission ("FCC") has, pursuant to a Notice of Proposed Rule Making ("NPRM"), announced its intention to unilaterally prescribe "benchmark" accounting rates which would apply between the United States of America (USA) and all sovereign nations. The FCC has invited comments on the manner in which its proposal should be implemented, but, be it noted, not on the more fundamental issue of whether the proposal ought to be implemented at all.

2. The FCC should not have conceived, let alone consider the implementation of such a proposal. It is our contention that the proposed Rule Making:

- (a) is unlawful under international law;
- (b) breaches rules of international comity; and
- (c) cannot, in any case, be justified on economic grounds.

(A) International Law

Unlawful

3. We have not had the opportunity to seek legal advice from experts on United States law. But one does not need to do so in order to recognise the unlawful nature of FCC's proposal. The rights, under international law, of one independent

sovereign nation, however powerful, can be no greater than the rights of another equally independent sovereign nation. If the USA claims the right under its domestic law to regulate IMTS accounting rates by mandating rates to be paid by US carriers to carriers in other countries, then other countries could assert similar rights under their domestic law. No one, least of all the USA, could deny other countries a similar right.

4. The above dilemma should demonstrate, that regardless of the bounds of US domestic law, it cannot be interpreted or applied so as to dictate the rates which US carriers pay foreign carriers and *vice versa*. No country could be denied an equal right to promulgate domestic law prescribing the accounting rates to be paid by their carriers to US and other foreign carriers. The conundrum would be a threat to peaceful co-existence.

5. Thus, any power contained in any US law, including Sections 201-205 of the Federal Communications Act to regulate charges, must be interpreted to relate to US domestic charges. No interpretation can logically accord plenary jurisdiction over the rates which may be charged by foreign carriers. That, indeed, has long been the position of the FCC which is on record as stating that:

*"Unlike domestic telecommunications our jurisdictions over international service applies only to one end of the service. Authority over the foreign end resides in the particular foreign correspondent."*<sup>1</sup>

6. It is indeed interesting that the FCC has not attempted to base the NPRM on any legal ground. In light of its earlier recognition that it has no legal jurisdiction over the foreign end of an international telephone message, it is apparent that the NPRM is based on extra-legal powers.

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<sup>1</sup>

Uniform Settlement Rates, 84 FCC 2d 121, 122 (1980).

7. The precedent which the NPRM would establish would be exceptionally dangerous and would undermine the sovereignty of other nations. The same principle would allow the USA under its domestic laws to:

- (a) mandate rates to be paid by US tourists for hotel accommodation abroad;
- (b) prescribe the landing fees and port charges to be paid by US airlines and ships to foreign ports of entry.

Indeed, the list could be multiplied *ad infinitum* to apply to all goods and services to be contracted by US residents in a foreign country.

8. The danger that other countries may take similar initiatives in telecommunications or other areas of economic activity should not be overlooked. Such action would be equally wrong, but the very existence of a precedent such as that contemplated by the NPRM could compromise our collective moral authority to speak out against such action.

#### The Abrogation of Existing Accounting Rate Regimes

9. The promulgation of the proposed benchmark rates would abrogate rights under existing contracts with US carriers. Telecommunications of Jamaica Limited ("TOJ") for instance has International Settlement Agreements with US carriers, namely, American Telephone & Telegraph ("AT&T"), MCI Corporation ("MCI") and Sprint Communications ("Sprint"). In these Agreements, the parties mutually agreed to annual incremental reduction in the accounting rates over a five-year period. FCC's suggested implementation deadline for the lowering of accounting rates, two years hence, is not in keeping with the schedule of reduced rates specified in these contracts.

10. In accordance with FCC practice, each settlement agreement was duly filed with the FCC and was not the subject of any objection. TOJ, therefore, naturally planned its development programme based on the integrity and binding legal effect of its Settlement Agreements with its co-carriers, including the US carriers. In addition, it has commenced a phased rate re-balancing programme taking into account the rates which were agreed until 2002.

11. It is, therefore, unfair and unlawful for the same agency which approved the existing Jamaica/USA accounting rate regime to unilaterally abrogate that regime. The FCC, in approving the accounting rate regime would have led all parties concerned to assume that the regime would be respected and indeed supported during its currency. There has been no dramatic change in traffic patterns or other factors underlying the basis on which the rates were negotiated. If anything, there has been a liberalisation of the international service menu and all three (3) carriers are now providing Home Direct and prepaid calling services from Jamaica.

12. It is, therefore, our contention that the FCC should not, in any event, abrogate accounting rates previously approved by it and on which the parties involved have based their respective businesses. It would amount to the deliberate expropriation of vested rights.

(B) **International Comity and the ITU**

13. The International Telecommunications Union Convention expressly recognises in its preamble "*the sovereign right of each country to regulate its*

*telecommunications*". Over 180 countries, including the USA, are parties to that Convention. It is inconceivable that a country can subscribe to the principle outlined in the preamble to the ITU Convention and yet claim for itself a right to unilaterally determine accounting rates among its carriers and carriers in some 184 member countries of the ITU.

14. The ITU Convention acknowledges that accounting rates are to be determined by bilateral agreements. The ITU Regulations provide at Article 6.2.1 that:

*"For each applicable service in a given relations, administrations shall by mutual agreement establish and revise accounting rates to be applied between them in accordance with the provisions of Appendix 1 and taking into account relevant CCITT Recommendations and relevant cost trends."*

The NPRM contemplates unilateral prescription of international accounting rates in direct contravention of the ITU Treaty. The FCC action flies in the face of international comity and will shake the very foundation of the ITU, *"the first genuine international, inter-governmental organisation to see the light of day"*.<sup>2</sup>

15. The force of international treaties lies in the fact that signatory States will, despite the absence of coercive sanctions, abide by their treaty commitments. The USA cannot take unilateral action which violates the ITU Treaty without compromising the force of the Treaty itself and indeed of all other treaties.

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<sup>2</sup>

George A. Coddington, Jr. and Anthony R. Rutowski, The International Telecommunication Union in a Changing World (Dedham, Mass. Artech House, 1982) p.3.

(C) **Economic Factors**

16. The FCC announced in the NPRM, as its primary goal, the promotion of effective competition in the global market for communication services. The arbitrary and unilateral imposition of accounting rates is an anathema to competition.

**International Competition**

17. Competition occurs within national borders and among nations. At the international level, the result of competition manifests itself in a country's balance of payments. It is a known fact that Jamaica (as is the case with most developing countries) has a high trade deficit with the USA. In Jamaica's case, it was US\$904 million in 1995 and for the first nine months of 1996 it was running at US\$777 million.<sup>3</sup> Those figures demonstrate the fact that, overall, the USA has a tremendous competitive advantage over Jamaica. The same is true in the case of other developing countries.

18. A feature of most undeveloped countries is an undeveloped telecommunications network, relatively low tele-density coupled with a low per capita income. Disposable income can seldom cover utilities such as water and power, let alone telecommunications. A country in that situation will naturally generate less telephone calls per capita than a highly developed country such as the U.S.A. The reason is obvious. A man earning US\$25,000 per annum is more likely to spend more money on a telephone services than one who earns US\$1,200.00.<sup>4</sup> In other words, in

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<sup>3</sup> The figure does not include services for which there are no reliable figures.

<sup>4</sup> Relative per capita income of both countries.

a country with a per capita income of 5% of that of the U.S., there will naturally be less disposable income to spend on telephone services.

### Socio-economic Basis of the Traffic Imbalance

19. The traffic imbalance exists because of a mix of socio-economic and cultural reasons. We have outlined above the principal economic factors. But there are associated social reasons. The USA is essentially a country of immigrants. There are nearly 2,000,000 Jamaicans living in the USA compared to 2,400,000 in Jamaica. With a per capita income of 20 times that of Jamaica and a telephone penetration of 50% compared to Jamaica's 15%, it is inevitable that more calls would originate from the USA than from Jamaica.

20. But who are making those calls? Studies undertaken in Jamaica reveal that the Jamaica/USA business IMTS traffic is basically symmetrical - that is to say, Jamaican businesses spend as much time calling their US colleagues as they spend calling Jamaican businesses. The imbalance is generated by Jamaicans in the USA making personal calls over residential lines to their homeland, i.e. ethnic traffic.

21. Jamaicans in the USA still maintain close ties to their homeland. They send cash and personal goods to their families on a regular basis. Over the last year, the remittance business has increased substantially with several US companies such as Western Union entering the market. For the period January to October of 1996, it was reckoned that personal remittances from overseas were in the region of US\$410.8 million.

22. Jamaican residents abroad make the extra calls, pay their US carriers which then remit to Jamaica a part of such payment as traffic settlement. Such ethnic



traffic is, in reality, a form of remittance - no different from the cash remittance handled daily by Western Union or the other remittance agencies. Analysis of the US-Jamaica incoming traffic reveals distinct demographic patterns. In poor rural communities, the ratio of incoming IMTS calls to outgoing IMTS calls is much higher compared to the more affluent urban centres.

23. Proof of the fact that socio-economic reasons lie at the heart of the matter can be further illustrated by the growth of Home Direct services from Jamaica. AT&T, MCI and Sprint have each introduced Home Direct services which are essentially collect calls to the USA initiated from Jamaica. The service is expensive, ranging from US\$3.08 to US\$4.11 per minute. An ordinary telephone call from Jamaica to the USA would attract collection rates which are approximately 50% less than the Home Direct services. Yet, the Home Direct dial services are the fastest growing service in Jamaica. The reason is that poor Jamaicans will continue to call collect. Thus the traffic imbalance will not respond to collection rates manipulation or other traffic stimulation techniques such as time-of-day discounts.

#### The Whole Picture

24. The FCC is looking only on one side of the equation. Any economic analysis of the international telecommunications trade between nations must take into account not only the trade in telecommunications traffic but also the trade in telecommunications technology. Only then can the true trade balance be struck. Jamaica produces no telecommunications technology. All forms of equipment (whether in the central office or the local loop) are purchased from developed countries primarily the USA.

25. Thus, the surplus earned by developing countries on the IMTS account is off-set by the deficit on the capital goods account. To be fair to developing countries, FCC should disclose and take into account the surplus on the capital goods account. Only then should the line be drawn and the balance struck.

26. The FCC should also realise that reduction of the accounting rate will impact adversely on the developing programmes currently underway in most developing countries. US equipment suppliers would be hard hit. We, therefore, call upon FCC to take a broader view of telecommunications industry when discussing the issue of the settlement deficit.

#### The Settlement Rate

27. FCC, in its NPRM, proposes a benchmarking methodology whereby all countries would be categorised as either low-income, middle-income or high-income. It proposes benchmark settlement rates of 23.4 cents for low-income countries, 19.1 cents for middle-income countries and 15.4 cents for upper income countries. The prescription of settlement rates based on the level of economic development is an inherent admission that the cost of terminating calls is higher in developing countries than in developed countries. That is indeed a fact. The ITU itself has, in a study, proven that the average cost per minute for telephone calls in developing countries was 2.08 times the cost in developed countries.<sup>5</sup>

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<sup>5</sup>

Peter A. Stern, The International Telecom Accounting and Settlements Debate, Transnational Data and Communication Report (July/August 1991) p.31.

28. The USA has the tremendous advantage afforded by economies of scale in a large market with wealthy buyers. Average annual investment per telephone is reckoned to be some US\$218.00 with average productivity per telephone running at more than US\$45,000.00<sup>6</sup> - the highest in the world. Comparative figures<sup>7</sup> for Jamaica are:

- |     |   |   |              |
|-----|---|---|--------------|
| (a) | Average annual investment per telephone | = | US\$725.00   |
| (b) | Average productivity per telephone      | = | US\$1,173.00 |

29. It is, therefore, a fact that the marginal cost for completing a one-minute call is lower in a developed country such as the USA when compared to a developing country. It means that the profit margin on a call unit would be much greater in the developed countries. In fact, in the developing countries, they could well be making a loss.

#### Universal Access Objective

30. Jamaica is small and mountainous. It has a tele-density of 15%. Its primary telecommunications goal is universal service in plain old telephone service (POTS). That means the provision of "life lines" in the deep rural areas. We regard this objective as socially and economically justifiable. However, the deeper the rural area, the higher becomes the average annual investment per telephone and the lower the revenue per line. This internal cost/revenue imbalance is not unique to Jamaica. It is recognised in the USA by a Universal Access Subsidy designed to assist carriers in penetrating uneconomic rural areas.

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<sup>6</sup> Phyllis Bernt and Martin Weiss, International Telecommunications SAMS Publishing 1993, p362-363.

<sup>7</sup> TOJ Ltd. 1996/97.

31. The unilateral imposition of the FCC benchmark rates would compel TOJ to cease entirely its rural development programme. Indeed, preliminary studies demonstrate that the loss of revenue could not be borne by the current customer base and the result would be widespread disconnections and substantial redundancy in the existing network. The dislocation in the economy would be substantial and disastrous.

32. Like most countries, we have taken steps towards gradually reducing the existing accounting rates with major US carriers. TOJ's current Settlement Agreements with the carriers which provide for annual incremental reductions are evidence of this rebalancing process.

#### Call-back and Third-party Billing

33. The traffic imbalance in many developing countries has been exacerbated by FCC itself which has openly encouraged services such as call-back and refile. It is unfair for the FCC, having itself contributed by its own policy to the traffic imbalance, to use it as a basis for its proposed course of action.

34. Based on the FCC proposal, outgoing rates for developing countries would increase (by virtue of the need to recover the shortfall from the reduction of incoming revenues), thereby creating the ideal environment for call-back operators to "cream-skim". Those operators pay no tax in the countries upon which they prey.

**Conclusion**

35. In light of all the above, we respectfully call upon the FCC to withdraw the proposals contained in the NPRM. Discussions with respect to international accounting rate ought to be initiated under the auspices of the ITU and should not be the subject of unilateral prescription by any country.

February 3, 1997